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No. 109 188

In the
Supreme Court of the United States

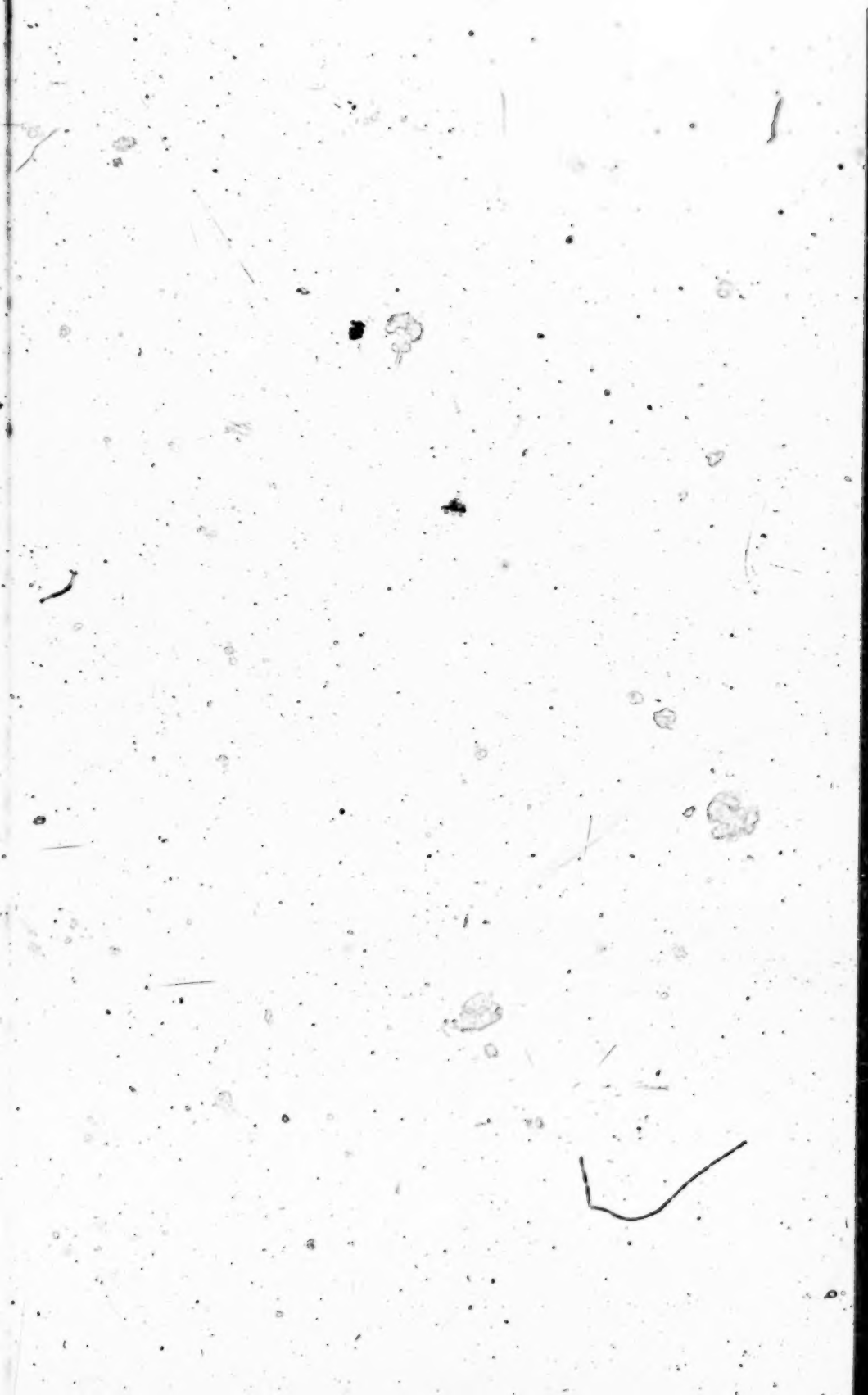
OCTOBER TERM, 1948

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI,
PETITIONER,

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED,
ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT



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PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI,
PETITIONER,

vs.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, ET AL.; RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT**

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the Public Service Commission of the State of Missouri, the legally constituted Commission for

*Since this number has been assigned to the same cause (*Federal Power Commission, et al. v. Interstate Natural Gas Co., Inc.*), it is used by this petitioner.

**The record of the proceedings in the court below has been filed in this court in the same cause (*Federal Power Commission et al., v. Interstate Natural Gas Co., Inc.*, No. 109) by the Solicitor General of the United States on behalf of the Federal Power Commission, and the same is hereby adopted, as submitted, by your petitioner. No separate record accompanies this petition for the reason it would be a mere duplicate of the record now on file. References herein to the record are made to the record as submitted by the Solicitor General on behalf of the Federal Power Commission.

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the regulation of public utilities operating in the state of Missouri, respectfully shows:

I.

Summary and Short Statement of Matter Involved

Summary: A fund of \$2,765,205, representing the difference between the wholesale interstate rates prescribed by the Federal Power Commission (hereinafter referred to as the Commission) and the rates actually charged and collected by the Interstate Natural Gas Company, Incorporated, (hereinafter referred to as Interstate) has accumulated pursuant to a stay order issued by the court below pending judicial review of the order of the Commission directing Interstate to reduce its wholesale interstate rates for natural gas. After the order of the Commission was sustained by this court in *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682, the gas company moved in the court below for an order directing the distribution of the accumulated fund. In spite of the provision of the original stay order that the money was "to be returned to the ultimate consumers of the gas or other persons * * * as contemplated by the provisions of the Natural Gas Act," the court below considered itself compelled by this Court's decision in the *Central States Electric Co. v. City of Muscatine*, 324 U. S. 138, to direct the distribution of the fund to the immediate purchasers of the gas from Interstate. The purchasers themselves were natural gas companies as defined by the Natural Gas Act and thus subject exclusively to the jurisdiction of the Federal Power Commission in respect to their wholesale sales. Their rates during

the impoundment period had been found by the Commission to have been excessive without regard to the lower costs which would result from the reduction of the rates of Interstate, and during or immediately prior to the impoundment period their rates were ordered reduced to reasonable levels.

Your petitioner seeks to have the opinion of the court below reviewed on the grounds:

1. That the *Central States Electric Co. v. City of Muscatine*, 324 U. S. 138, does not compel distribution of the accumulated fund to the immediate purchasers of gas from Interstate Natural Gas Company, Incorporated, as a matter of law.

2. If the *Central States* case does compel such distribution of the accumulated fund, then the rationale of that case should be reexamined and either modified or disapproved.

Short Statement: The history of the case may be briefly stated as follows:

The Federal Power Commission issued its order on April 27, 1943, requiring Interstate Natural Gas Company, Inc., to reduce its rates on and after May 15, 1943, by \$1,100,345 per annum as applied to its 1941 volume of sales. 3 F. P. C. 416, 432, 434-435. The Commission, on June 9, 1943, denied Interstate's petition for rehearing which Interstate had filed on May 13, 1943. 3 F. P. C. 1018.¹ On June 14, 1943, Interstate filed in the Circuit Court of Appeals for the Fifth Circuit a petition for re-

1. The Commission modified its order to reduce the amount of the rate reduction by \$8,762 to \$1,091,583, and postponed the effective date to June 15, 1943.

view of so much of the Commission's order as pertained to its rates on sales for resale to Mississippi River Fuel Corporation (hereinafter referred to as Mississippi), Southern Natural Gas Company (hereinafter referred to as Southern Natural), and United Gas Pipeline Company (hereinafter referred to as United Gas), the latter company buying gas for the account of Memphis Natural Gas Company (hereinafter referred to as Memphis). The Commission had found the rates on the above sales to be excessive in the amount of \$596,320 per year. The circuit Court of Appeals for the Fifth Circuit denied the petition for review, Judge Waller dissenting; (*Interstate Natural Gas Company Inc., v. Federal Power Commission*, 156 F. (2d) 949) and this Court, on June 16, 1947, affirmed, 331 U. S. 682. Interstate's petition for a rehearing by this court was denied on October 13, 1947. 332 U. S. 785. The reduced rates were put into effect commencing with deliveries for the month of October, 1947.

Ancillary to its petition for review in the Circuit Court of Appeals, Interstate prayed the court to stay the operation of the rate reduction order pending review thereof, upon such terms and conditions as might be prescribed by the court. The stay was granted on June 14, 1943, on condition that Interstate pay into the court's registry the monthly difference between payments under the existing rates and those required under the Commission's order (R. 1, 2). The entire expense of impounding the funds was placed upon Interstate, and it was provided by the stay order that no interest should be charged Interstate unless allowed by the court upon application (R. 2).

The stay order further provided (R. 42):

"The amounts so deposited shall remain on deposit subject, however, to the further Order or Orders of this Court to be returned to such ultimate consumers of gas, or other persons to whom the Court shall find the same should be returned, as contemplated by the provisions of the Natural Gas Act."

* * * * *

Full power and jurisdiction is reserved to cancel or modify this Order and to enter any other orders (with or without application of the parties) to protect or to promote the rights and interests of the parties to this litigation and of the ultimate consumers or other parties financially interested in the impounded funds."

Pursuant to the stay order, Interstate deposited \$2,444,573 in the registry of the court. Some \$320,000 more not paid into the court's registry, is admitted by Interstate to be due under the terms of the stay order. (R. 43, 52, 75)

On December 18, 1947, subsequent to this court's denial of rehearing, Interstate moved the court below for an order distributing the impounded fund to its four immediate purchasers, Mississippi, Southern Natural, United Gas for the account of Memphis, and Memphis. (R. 16-19)² All four companies thereupon moved to intervene in the proceeding (R. 42-48, 49-54, 71-81, 100-103), and intervention was allowed (R. 67). United Gas claimed an allocable share on behalf of Memphis to which it had resold the gas purchased from Interstate

2. The sales of natural gas to United Gas involved in that portion of the Commission's order which was reviewed covered the period from June 1, 1943, to December 10, 1945, and were for resale to Memphis (R. 43). Thereafter, pursuant to a contract between Interstate and Memphis, Memphis made its purchases directly from Interstate.

(R. 100). The other purchasing companies, Mississippi, Southern Natural, and Memphis, claimed their allocable share for themselves and urged that under *Central States Electric Co. v. City of Muscatine*, 324 U. S. 438, the court had no choice but to distribute the monies to them subject to whatever rights the ultimate consumers might have under state law. Your petitioner, the Public Service Commission of Missouri, the Illinois Commerce Commission, the Memphis Light, Gas and Water Division of the City of Memphis, and the City of Jackson, Tennessee, also intervened (R. 68-71, 92-95, 21-41, 81-87). The Missouri Public Service Commission and the Federal Power Commission urged in opposition to the claims of the purchasing companies that the *Central States* case was not here applicable since the claiming companies were "natural gas companies": whose rates for transportation or sale at wholesale of natural gas in interstate commerce were not subject to local regulation. Your petitioner further pointed out that voluntary rate reductions and Federal Power Commission rate reduction orders during the impoundment period showed that these companies were earning not less than a reasonable rate of return on their interstate business without the benefit of the impounded excess.

Mississippi River Fuel Corporation is the pipe line which purchased gas from the Interstate Natural Gas Company, Incorporated, and resold it at wholesale in Missouri. During the impoundment period the Federal Power Commission issued an order requiring Mississippi to reduce its wholesale rates for gas, and in that order of the Federal Power Commission, there was a provision that if the Commission's order in the *Interstate Natural*

Gas Company case was upheld, Mississippi should further reduce its rates by the amount withheld.

In the court below your petitioner pointed out that, in Missouri, the distributing companies (Laclede Gas Light Company, St. Louis County Gas Company, (now merged with Laclede Gas Light Company) and the Missouri Natural Gas Company) consented to an order by the Public Service Commission of the State of Missouri requiring said companies to disclaim any interest in the impounded monies and to agree to pass on to their customers these funds in such manner as the Public Service Commission of the State of Missouri might direct. Had the court below ordered the money given the ultimate consumers as was provided in the original order, we would not have been confronted with any claim by the distributing companies because of the previous actions of the Missouri Public Service Commission. The path had been cleared for the return of the money to the consumer.

The court below held, citing only the *Central States* case, that "whatever may be the rights of ultimate consumers or others to require the pipe line companies who have overpaid Interstate to account to them in respect to such overpayments, it is not our function to search out or declare them. The only appropriate order for this court to enter is one requiring Interstate to repay to the three pipe line companies the monies which Interstate wrongfully exacted from them under the protection of our order, such distribution to the three pipe line companies, however, to be without prejudice to the rights, if any, of ultimate consumers or others to hold said companies to account in respect thereof." (R. 105) The court, accordingly, entered an order directing that the fund be dis-

tributed to Interstate's immediate purchasers, in accordance with the terms of its opinion. (R. 109-112)

II.

Jurisdictional Statement

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 359, §347) invests the Supreme Court with jurisdiction to require by certiorari that the causes sought to be reviewed shall be certified to it.

The date of the judgment or decree sought to be reviewed is May 12, 1948. The date of the opinion by the Circuit Court of Appeals for the Fifth Circuit is also May 12, 1948, and it is recorded at 166 F. (2d) 796.

III.

The Questions Presented

This proceeding presents the following questions, namely:

1. Does the *Central States Electric Co. v. City of Muscatine*, 324 U. S. 138, compel the distribution of the accumulated funds to the immediate purchasers of gas from the Interstate Natural Gas Company, Incorporated, as a matter of law?

2. If the *Central States* case so provides, should the rationale thereof be reexamined and modified or disapproved?

IV.

Reasons for Granting the Writ

The petitioner contends that the court below erred in holding that it was required by *Central States Electric Co.*

v. City of Muscatine, 324 U. S. 438, to order the distribution of accumulated fund to Interstate's immediate purchasers for the following reasons:

(1.) The immediate purchaser of gas in the *Central States* case was a local distributing company subject to regulation, if at all, only in accordance with local Iowa law, whereas the immediate purchasers of the gas in the instant case are natural gas companies subject to regulation by the Federal Power Commission under the Natural Gas Act.

(2.) The court below by holding the *Central States* case applicable to this situation has deprived the ultimate consumers of any means of testing the right of the immediate purchasers of gas to retain this fund, and has given the immediate purchasers of the gas an undeserved windfall.

(3.) The result of the decision of the court below is to render nugatory the steps taken by the Public Service Commission of the State of Missouri to effect distribution of that portion of the accumulated fund due Missouri consumers.

(4.) The *Central States* case is distinguishable in that the terms of the stay order there involved are fundamentally different from the terms of the stay order in the instant case.

(5.) The *Central States* case is further distinguishable in that the distributing company claiming its allocable share contended that it had not earned a fair rate on its investment during the impoundment period. In the instant case there is no question of the immediate purchasers having earned less than a fair rate.

Discussion:

1. In the *Central States* case the immediate purchaser of the gas was a local distributing company subject to regulation only in accordance with local Iowa law. This Court there held that a federal court had no power to determine whether or not the funds accumulated pursuant to its stay order, pending review of a Commission order directing the natural gas company to reduce its rates, belonged to the local distributing company purchasing gas from the natural gas company or its customers, "that being a legislative function of the state of Iowa" (pp. 143-144). The Natural Gas Act, this Court there pointed out, left to "the states the function of regulating the intra-state distribution and sale" (p. 144).

Here the immediate purchasers are natural gas companies within the meaning of, and subject to, the Natural Gas Act and the question presented is whether the *Central States* decision deprives the federal court, which stayed the Commission's order, of authority to distribute the accumulated funds to anyone but these immediate purchasers. There is nothing in the rationale of the *Central States* case requiring such a result for in this case the question does not arise out of conflicting claims of a local distributing company and its customers, a matter which this court treated as being subject to state control. The immediate purchasers in the instant case are themselves Natural Gas Companies engaged in the transportation or sale at wholesale of natural gas in interstate commerce and are subject to regulation only by the Federal Power Commission. *Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498. The activities of these immediate purchasers are not local in character and are not subject to

state regulation, even in the absence of Congressional action. *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298; *Public Utilities Commission v. United Gas Co.*, 317 U. S. 456; *Interstate Gas Co. v. Federal Power Commission*, 331 U. S. 682, 689; cf. *Public Utilities Commission v. Attleboro Steam Co.*, 273 U. S. 83. In fact, it was the absence of state regulatory power in this field that prompted the Congress to enact the Natural Gas Act in 1938. H. Rep. No. 709, 75th Cong., 1st sess., p. 2; *Interstate Gas Co. v. Federal Power Commission*, 331 U. S. 682, 690; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 610.

No question of local law is involved in the instant case in regard, at least, to the claims of Interstate's immediate purchasers as against more remote purchasers. The only question between the immediate purchasers and the more remote purchasers who resell is the reasonableness of rates enjoyed by natural gas companies, and this is not a question of local law. In fact, a local law question could not arise if the claimants were the immediate purchasers and the ultimate consumers (i.e., the remote purchasers who do not resell), because that situation would arise only when the companies selling to the ultimate consumers have disclaimed and thereby eliminated the local law question. It follows that under such circumstances there would have been no interference with the rate regulatory jurisdiction of any state had the court below refused to distribute the accumulated fund to Interstate's customers.

2. Since the state has no authority over the impounded funds, the consequence of the opinion of the court below is to deprive the ultimate consumers of any means of testing the right of the immediate purchaser.

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to retain the fund. If the court below is without power to order the funds distributed either to the local distributing companies or the ultimate consumers, the parties to whom the excessive charges have been passed on, the immediate natural gas companies have received an undeserved windfall. In spite of the nominal preservation of the court below "of the rights, if any, of the ultimate consumers or others to hold said companies to account in respect" of the accumulated fund, there is no power in any person or tribunal to compel these companies to pass on any of the monies to be contributed to them. There is no privity between these companies and the ultimate consumers because the ultimate consumers purchase from the distributing companies. The distributing companies are without legal rights in the fund, since the rates charged them during the impoundment period were legal rates charged all customers. Section 4(c) of the Natural Gas Act, 15 U. S. C. 717c(c); cf. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe R. Co.*, 284 U. S. 370, 384. The Federal Power Commission is without power to affect these rates because it cannot fix retroactive rates nor can it issue reparation orders. Section 5 of the Natural Gas Act, 15 U. S. C. 717d; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591; cf. *Public Utilities Commission v. United Gas Company*, 317 U. S. 456. For that reason, the Commission may not require the purchasing companies to pass on the benefits of the stay order. Also, under the decisions of this court the state regulatory commissions, including your petitioner, are powerless to compel these companies to disgorge that portion of the refunds attributable to their interstate sales of gas at wholesale. *Public Utilities Commission v. United Gas Co.*, *supra*, at

468; *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298;
cf. *Public Utilities Commission v. Atleboro Steam Co.*, 273
U. S. 83; *Illinois Gas Co. v. Public Service Co.*, 314 U. S.
498.

The effect of the extension of the *Central States* case in the instant situation is to take the excess over the fair return allowed by the Commission from one natural gas company and give it to another which is already earning a fair return. It denies all return to the ultimate consumers of the overcharges paid by them for four years while the courts were affirming the reduction ordered for their benefit.

3. Anticipating that the accumulated fund would be ordered distributed in such a way as to enable the ultimate consumer of the gas to obtain reimbursement of the excess amounts paid by him for the gas, the Public Service Commission of the State of Missouri published its order, which was consented to by the distributing companies, requiring said distributing companies to disclaim any interest in the impounded fund and to agree to pass on to their customers these funds in such manner as the Missouri Public Service Commission might direct. However, the decision of the court below in ordering the fund distributed to the immediate purchasers of the gas, said purchasers being natural gas companies not subject to the jurisdiction of the state, has deprived the local authority of its means of effecting the distribution of the fund to the local consumer and has rendered nugatory the steps previously taken. As a result of the decision of the court below, no remedy is now available to the ultimate purchaser to recoupe the excess charges paid by him for the gas and the statutes,

both state and federal, enacted for his protection have been rendered impotent.

4. The *Central States* case is distinguishable from this case in that the stay orders involved are fundamentally different. In the *Central States* case, the stay order provided for the filing of a bond to secure the refund to the purchasers at wholesale, i.e., the immediate purchasers, rather than the ultimate consumers. Here, however, the stay order recognized that the ultimate consumers had a claim in the impounded fund. It provided (R. 2) that the fund should be returned to "such ultimate consumers of gas or other persons to whom the court shall find the same should be returned, as contemplated, by the provisions of the Natural Gas Act," and full jurisdiction to cancel or modify the order "to protect or promote the rights and interests * * * of the ultimate consumers or parties financially interested in the impounded funds" was reserved by the court. From the wording of the stay order, it is apparent that the court below intended, when it entered the order, to distribute the fund to the ultimate consumers.

5. In the *Central States* case the distributing company claiming its allocable share contended that it had not earned a fair return on its investment during the impoundment period, and it was doubtful whether the company would have passed the benefits of the reduced rates on to its customers. Here, however, the Commission, immediately before the Interstate rate order and while it was suspended during the four years that it was being reviewed, investigated into the reasonableness of the rates charged by United Gas, Memphis, Mississippi and Southern Natural, found them unreasonably high, and either ordered them reduced to reasonable levels or secured

voluntary reductions to such levels. In determining what those rates should be, the Commission did not, however, with respect to the period before the affirmance of the Interstate rate order, include the reduction in the cost of the purchased gas which would result when and if that order was sustained.. *United Gas Pipe Line Co.*, 3 F.P.C. 402, *Memphis Natural Gas Co.*, 3 F.P.C. 566; *Southern Natural Gas Co.*, 5 F.P.C. 427, 662 (order allowing rate schedules); *Mississippi River Fuel Corp.*, 4 F.P.C. 340, 363.

If the Interstate order had not been stayed, the reduction in its rates would at once have been reflected in reduced operating expenses of its immediate purchasers. The formula used by the Commission in determining the rates of those purchaser companies necessarily would have resulted in additional reductions of their rates but for the stay order. Cf. *Mississippi River Fuel Corp.*, 4 F.P.C. 340, 359, 363.

If, notwithstanding the considerations set forth above, the Court is of the opinion that the *Central States* case extends to the situation here presented, then we submit that this Court should reexamine the rationale of that case and so modify it as to eliminate the injustice which presently is resulting from the impact of that decision on the disposition of funds accumulated under stay orders granted for the financial protection of "natural gas companies" which desire to challenge rate reduction orders of the Commission.

Under the interpretation put upon the *Central States* case by the court below, whenever a Commission rate reduction is stayed pending judicial review, the funds accumulated during the period of review, here four years,

must be distributed to the natural gas company's immediate purchasers, which claim their share of the fund, without regard to whether these claimants are natural gas companies or local distributing companies, or to whether they earned a reasonable return during the impoundment period. For that period, we submit, not only are the ultimate consumers of gas deprived *pro tanto* of the protection from "exploitation at the hands of natural gas companies" which protection was "the primary aim" of the Natural Gas Act (*Federal Power Commission v. Hope Natural Gas Co.*; 320 U. S. 591, 610, 612), but the Natural Gas Act is perverted into a law which "exploits consumers and unjustly enriches distributing companies" and natural gas companies (cf. *Central States Electric Co. v. City of Muscatine*, 324 U. S. 138, 146, 151 (dissenting opinion)).

Moreover, a requirement that the accumulated fund must be turned over to the immediate purchasers without regard to the surrounding circumstances, offers, we submit, a powerful incentive to seek judicial review of a Commission rate reduction order, regardless of the frivolity of the grounds, where, as here, the natural gas company, whose rates are ordered reduced, and one or more of its immediate purchasers are subsidiaries in a single operating system, a situation which is not uncommon in the natural gas industry. For instance, in the present case, Interstate is affiliated with Mississippi. The Standard Oil Company (N. J.) owns 22.5% of Mississippi's stock as well as 53.97% of Interstate's stock and Mr. Frank H. Lerch, Jr., is president of both companies. See Record in *Interstate Natural Gas Co. v. Federal Power Commission*, No. 733, October Term, 1946, Vol. I, pp. 241, 242, 245, 247, 250-254; Vol. II, pp. 706, 723. Where

affiliation is present, the requirement that the impounded fund be distributed to immediate purchasers operates to retain that portion of the reduction within the holding company system, the sole consequence of the rate reduction order being merely to shift the amount of reduction from the treasury of one subsidiary to that of another.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 10,701, *Interstate Natural Gas Company, Inc. v. Federal Power Commission, et al.*, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated July 31, 1948.

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